

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

:

MARK S. REESE, SR., on behalf of :

himself and all others similarly : Civil Action No.

situated : 3:16cv496

:

vs. :

: August 31, 2017

STERN & EISENBERG MID-ATLANTIC, PC :

:

COMPLETE TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Craig Marchiando, Esquire
Leonard A. Bennett, Esquire
Consumer Litigation Associates, PC
763 J Clyde Morris Boulevard
Suite 1A
Newport News, Virginia 23601
Counsel for the plaintiffs

Leland H. Jones, IV, Esquire
Wiley Rein, LLP
1776 K Street NW
Washington, D.C. 20006
Counsel for the defendant

Peppy Peterson, RPR
Official Court Reporter
United States District Court

P R O C E E D I N G S

THE CLERK: Case number 3:16CV496, Mark S. Reese, Sr., et al., versus Stern & Eisenberg Mid Atlantic, PC, et al. The plaintiffs are represented by Leonard Bennett and Craig Marchiando. The defendants are represented by Leland Jones. Are counsel ready to proceed?

MR. MARCHIANDO: Plaintiffs are.

MR. JONES: Defendant is ready, Your Honor.

THE COURT: All right. This is a motion for preliminary approval of a class action settlement.

MR. MARCHIANDO: Your Honor, this is final approval for this settlement.

THE COURT: Excuse me. I'm sorry. I was looking at the wrong -- final approval is ECF number 56 and the attorneys -- appeal of attorneys' fees.

MR. MARCHIANDO: That's correct, Your Honor.

THE COURT: Let's take the attorneys' fees first.

MR. MARCHIANDO: Certainly. Your Honor --

THE COURT: And let me just give you some instruction here maybe all of you need to pay attention to. You can't take any comfort out of the citation you make to the --

MR. MARCHIANDO: *Karnette* case, Your Honor?

THE COURT: Yeah. The history of that case is pretty simple. There's a bunch of detailed reports that were

1 submitted, and I couldn't make heads or tails out of them, what
2 they were doing because they were so skimpy, and I made them
3 categorize them. Then I had an integrated set of documents to
4 review.

5 I didn't say you could just get away with sloppy
6 time-keeping and categories for making -- you have to offer up
7 the background data so that the other side can object to any of
8 it if they want to and then do the categorization. So this
9 isn't right. And in addition to that, I can't make heads or
10 tails out of these attorneys' fees petitions.

11 I can't understand them. It's just not going to
12 work, and there are two ways to deal with that: An attorney's
13 fee award of zero because you haven't met the requirements or
14 you do it again and do it right.

15 MR. MARCHIANDO: I'd like the second option, please,
16 Your Honor.

17 THE COURT: And I'm going to tell you, you have to
18 explain and make some sense out of some of this stuff. Here's
19 what happened in this case: Now, we've got \$7,755. Remember,
20 this is against an award of a small amount for the class.
21 14.10 hours of Mr. Pittman's in pre-filing preparation and
22 pleading work. Why? Why is that -- why is 14 hours
23 appropriate for that? I can't imagine that that's appropriate.

24 You have 51.8 hours listed as motions practice, and
25 most of the motions were unopposed, and you knew they were

1 going to be unopposed. And, in addition to that, we had to
2 tell you several times, by phone and otherwise, what to do.
3 You don't get to bill time for correcting something that you
4 fouled up. That's just not allowed.

5 And the general categories are listed as motions
6 practice, and then the other labels are very vague and very
7 unhelpful, particularly given that you don't have the backup
8 submitted with it.

9 So with that in mind, maybe you'd like to file an
10 application. So what does that do -- a revised application, or
11 we can arbitrarily decide upon a figure today that seems
12 reasonable. What do you think might be a reasonable
13 settlement, Mr. Jones? You are over there moaning and groaning
14 in your papers about the fee, but you don't really say what you
15 think is appropriate, I don't think, other than to say the
16 magistrate judge is appropriate.

17 Well, suppose he's wrong, and I think the magistrate
18 judge erred in this situation in saying that the evidence
19 supported only the filing done by the person who appeared on
20 the ECF notice because of the way the ECF system works. That
21 doesn't necessarily provide a good barometer for making an
22 attorneys' fees award.

23 But is it your judgment somewhere around 40- or
24 \$50,000 is a fair fee or what? Come to the lectern. Maybe we
25 can agree on something. You have reviewed their fees, haven't

1 you?

2 MR. JONES: Yes, Your Honor.

3 THE COURT: Did you review the background data that
4 they provided?

5 MR. JONES: Only the data that was submitted in the
6 filings before the Court and with respect to Judge Novak's
7 report and recommendation --

8 THE COURT: I thought with the magistrate judge, they
9 actually submitted underlying time records, didn't they?

10 MR. JONES: No, Your Honor, I don't believe so.
11 Maybe I'm incorrect.

12 MR. MARCHIANDO: Your Honor, we submitted the
13 underlying time records with our objections to the R&R. So the
14 first set was the summary and then --

15 THE COURT: You never did give them to the magistrate
16 judge?

17 MR. MARCHIANDO: Correct.

18 THE COURT: Have you looked at the underlying time
19 records that they submitted in their -- with the objections?
20 They were submitted with the objections, but I thought they
21 were somehow submitted beforehand. Do you have anything, any
22 view on that, what would be a fair and reasonable attorneys'
23 fees in this case?

24 MR. JONES: I think, Your Honor, our position is
25 still the same of I understand Your Honor's position --

1 THE COURT: But your position is based on an
2 erroneous premise, and that is that it's appropriate to do it
3 the way the magistrate judge did it. I don't think it is.

4 MR. JONES: Yes, Your Honor.

5 THE COURT: So I'm asking you independent of that
6 notion, do you have some judgment as to what might be a fair
7 attorneys' fees request looking at -- having looked at the
8 detailed time records that they submitted in connection with
9 the objection?

10 MR. JONES: Your Honor, with respect to the amount
11 that is appropriate, we took issue with respect to the amount
12 that was incurred in the motions practice which, as Your Honor
13 indicated, was uncontested motions of approximately 60 hours in
14 total.

15 THE COURT: Do you want to strike it all?

16 MR. JONES: No, Your Honor.

17 THE COURT: How did you come up with what -- let me
18 see what you say you think is a fair figure here. Maybe I
19 misunderstood you. Where in your paper is your exact figure
20 that you propose?

21 MR. JONES: We proposed an exact figure, Your Honor,
22 before Magistrate Judge Novak. We recommended, given the
23 amount of the fees of -- the award to the class of \$9,870 that
24 it be based on a proportion of that number. Given the backup I
25 think with 60 hours, it would be appropriate, given the

1 uncontested nature of the motions, that the motions hours
2 should be between 20 and 25 hours would have been appropriate
3 given the plaintiff's counsel's position that they had to do
4 independent work associated with the class certification
5 motion, the motion for preliminary approval --

6 THE COURT: Did you figure that out mathematically as
7 to what that would be?

8 MR. JONES: Not mathematically, Your Honor.

9 THE COURT: How can I do it if you don't do it? I
10 don't know what basis you are using to get to the -- what you
11 say that yields. You don't have a figure, do you?

12 MR. JONES: No, Your Honor.

13 THE COURT: I didn't think I saw one except the one
14 the magistrate judge awarded. Can I approve the settlement
15 without approving the fees?

16 MR. MARCHIANDO: Yes, you can.

17 THE COURT: The settlement agreement without
18 approving the fees?

19 MR. MARCHIANDO: Yes, you may. The settlement
20 agreement allows for submission of the fees as we've done, so I
21 don't think there's anything that stands in the way of
22 approving one independent of the other.

23 THE COURT: Who's paying these fees?

24 MR. MARCHIANDO: The defendant is paying the fees
25 separately, Your Honor.

1 THE COURT: Out of their pocket.

2 MR. MARCHIANDO: Pardon?

3 THE COURT: Out of their pocket.

4 MR. MARCHIANDO: Correct. This is not coming from
5 any class member's recovery. There's no cost of administration
6 or anything coming out of that at all. It's all being
7 separately paid by the defendant.

8 THE COURT: All right. You're going to re-file an
9 application for attorneys' fees, and you're going to look at
10 the figures, the re-filed figures, and you give me a figure and
11 you give me a figure, Mr. Jones.

12 MR. JONES: Yes, Your Honor.

13 THE COURT: All right. Then we'll go from there. I
14 want you, when you are doing it, I don't want a bunch of -- I
15 don't want a whole lot of lawyers --

16 MR. MARCHIANDO: Understood, Your Honor.

17 THE COURT: -- accounted for. The day of having too
18 many lawyers feeding at the trough is over.

19 MR. MARCHIANDO: Understood, Your Honor.

20 THE COURT: It's just getting out of hand. One case
21 I had just recently there were four or five law firms for the
22 plaintiff. That's unnecessary. You can't justify that
23 anymore. No private client would approve that kind of thing.
24 Nobody would. You look at how lawyers' fees are being judged
25 now, they're being judged in a different way in the

1 marketplace, so you have to adjust your claim to fit the
2 marketplace.

3 MR. MARCHIANDO: Understood, Your Honor.

4 THE COURT: All right. Let's go through the motion,
5 number 56.

6 MR. MARCHIANDO: Certainly, Your Honor. I should
7 begin by apologizing for the confusion that I've likely created
8 with Mr. Stefany. I was of the belief when he spoke to me
9 about when Mr. Bennett would arrive that there was something
10 independent that the Court needed Mr. Bennett for, not this
11 motion. It was always intended that I would argue it, and if I
12 created confusion with the Court's schedule this morning, I
13 apologize. I should have spoken up and advised Mr. Stefany --

14 THE COURT: We're fine. We just moved on. Got other
15 people in line.

16 MR. MARCHIANDO: Certainly, Your Honor.

17 THE COURT: Thank you, though.

18 MR. MARCHIANDO: The settlement is virtually
19 unopposed. There is a cash award going directly to class
20 members. We were able to find --

21 THE COURT: Is this firm still doing this practice,
22 this kind of thing?

23 MR. MARCHIANDO: My understanding is they've changed
24 their letter, Your Honor.

25 THE COURT: All right.

1 MR. MARCHIANDO: So all class members are going to
2 get a cash payment of \$70. We were able to find 139 of 141
3 class members, find good addresses for them, so about
4 98.5 percent of the class members got their notice. No one
5 said anything about -- there were no comments about --

6 THE COURT: No opt-outs, no objections.

7 MR. MARCHIANDO: Correct, no opt-outs, no objections,
8 no comments or objections from the Attorney General of the
9 United States or the Attorney General of Virginia.

10 This is as neatly packaged a settlement, I think, as
11 we can present to Your Honor. There's no opposition
12 whatsoever. The terms are straightforward. Class members
13 don't have to do anything to receive their money. Anything
14 that's left over after a second distribution to class members
15 that cashed their first checks, that money will be given to the
16 Virginia Poverty Law Center as agreed by the parties and with
17 Court approval, of course.

18 There is not any reduction in the amount class
19 members will receive for attorneys' fees or costs, our costs or
20 cost of settlement administration. All that's being separately
21 paid by the defendant.

22 THE COURT: What has the cost of administration been?

23 MR. MARCHIANDO: I think it was around \$7,500.

24 MR. JONES: Yes, Your Honor. That has been the
25 estimate, and I believe now we've been billed on a monthly

1 basis, and I think we're probably less than 1,500 or \$2,000 as
2 of right now.

3 THE COURT: You're going to stay within the target,
4 it looks like.

5 MR. JONES: Yes, Your Honor, well within that.

6 THE COURT: What are you talking about, uncashed
7 checks? Each class member -- what is the total class number,
8 100 and what?

9 MR. MARCHIANDO: 141, Your Honor.

10 THE COURT: And you got good addresses for 139?

11 MR. MARCHIANDO: That's right. So I didn't
12 articulate very well the payment process. So everyone will get
13 their check, and then any money that's unclaimed, the first
14 round of checks that's not cashed, there will be a second
15 distribution of whatever is left equally to the class members
16 that did cash their first checks.

17 THE COURT: What happens to the \$140 for the two that
18 you didn't get notice? Is that thrown in that pot, too?

19 MR. MARCHIANDO: Correct. So everyone will get a
20 little more than \$70.

21 THE COURT: All right. Anything else? Do you have
22 anything to say about the settlement?

23 MR. JONES: No, Your Honor.

24 THE COURT: All right. Well, I find that under the
25 *Jiffy Lube* factors and in general, the settlement is fair and

1 reasonable given the circumstances -- I think the relative
2 strength of the plaintiffs' case was strong. In terms of the
3 difficulties of proof, as to the defense there weren't a lot of
4 difficulties, but it was whether or not it was enough money to
5 pay anybody anything, or else what would happen if the case
6 went to trial.

7 There's always, of course, the risk of litigation --
8 of losing no matter what a Court assesses as the strength of
9 the litigation, so that had to be taken into account, and, of
10 course, the solvency of the defendant is a factor and the
11 likelihood of recovery on a bigger judgment, and I think that
12 was a major force in arriving at what the Court concludes to be
13 a reasonable settlement in the case.

14 The degree of opposition to the settlement is zero.
15 There is no opposition to it. So the case was settled at the
16 right time in its course. Discovery had been conducted to the
17 extent it needed to be conducted, and the negotiations were
18 arms'-length negotiations presided over by the magistrate
19 judge, and counsel is experienced in the area, and that assists
20 with assessing how fair it is. It's arrived at by lawyers with
21 knowledge about the topics to be litigated.

22 So the order of the settlement will be approved.
23 Attorneys' fees will be briefed. When are you going to file a
24 brief on the -- make application, Mr. Marchiando?

25 MR. MARCHIANDO: File it in two weeks?

1 THE COURT: I just need to know for the order, that's
2 all.

3 MR. MARCHIANDO: We can file it --

4 THE COURT: Two weeks, what is that?

5 MR. MARCHIANDO: We're turning over the calendar, so
6 I can't --

7 THE CLERK: September 14th.

8 THE COURT: September 18 then is a Monday. And then
9 your objections, if you have any, and I guess -- so I'm going
10 to, for the reasons I've said, that I don't think that the
11 magistrate judge's opinion arriving at the \$43,000 fee was
12 based on the right analytical approach, I'm going to sustain
13 the objections and direct that you submit the attorneys' fees
14 application directly to me rather than going back through the
15 process again.

16 I've already reviewed a lot of these things,
17 information in order to review the appeal. So I'll just go on
18 and take it back and consider it. Is that all right with both
19 of you, because I think your agreement said it should go to the
20 magistrate judge.

21 MR. MARCHIANDO: That's fine with us, Your Honor.

22 THE COURT: Is that all right with you?

23 MR. JONES: Yes, Your Honor.

24 THE COURT: I'll do it that way then. When are you
25 going to file your response to his new application, Mr. Jones?

1 He's filed on September 18th.

2 MR. JONES: Your Honor, if we could have 14 days
3 should be sufficient, Your Honor.

4 THE COURT: It will be October 2nd; is that all
5 right?

6 MR. JONES: Yes, Your Honor.

7 THE COURT: And then any reply will be on
8 October 9th.

9 THE COURT: Is this proposed order on something you
10 can send to my office on a computer so we can use it as -- I'm
11 going to have to have some notification. I don't want to have
12 to redo the whole thing.

13 MR. MARCHIANDO: Yes, Your Honor, we can definitely
14 do that.

15 THE COURT: All right, that's fine. Is there
16 anything else that needs to be done in this case at this time?

17 MR. MARCHIANDO: No, Your Honor.

18 THE COURT: And this order will be -- these orders
19 will be entered, and we'll go from there. Thank you very much.
20 We'll take a 20-minute recess.

21

22 (End of proceedings.)

23

24

25

Date _____